

In the Matter of Merchant Mariner's Document No. Z-407384-D1 and all other Seaman Documents

Issued to: NICHOLAS M. NOMIKOS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1218

NICHOLAS M. NOMIKOS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 22 April 1960, an Examiner of the United States Coast Guard at Galveston, Texas suspended Appellant's seaman documents upon finding him guilty of misconduct. The three specifications found proved allege that while serving as the Chief Steward on board the United States SS PANDORA under authority of the document above described, on or about 8 February 1960, Appellant assaulted the Chief Engineer by brandishing a meat cleaver in a threatening manner and offering to inflict bodily harm; he wrongfully created a disturbance to the prejudice of good order and discipline; Appellant disobeyed a lawful order of the Master to stay out of the engine room.

At the hearing, Appellant voluntarily elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of the Chief Mate, the Third Assistant Engineer, a fireman-watertender and the Master. All of these witnesses were present to some extent during the incident which resulted in the above specifications.

In defense, Appellant offered in evidence his own testimony and that of three other witnesses. None of the latter were eyewitnesses to the alleged offenses but they had been helping Appellant earlier in the day when the Chief engineer interfered with their work.

At the end of the hearing, the Examiner rendered the decision in which he concluded that the charge and three specifications had been proved. The Examiner then entered an order suspending all documents, issued to Appellant, for a period of six months.

FINDINGS OF FACT

On 8 February 1960, Appellant was serving as the Chief Steward on board the United States SS PANDORA and acting under authority of

his document while the ship was at sea.

On the afternoon of this date, Appellant and others were cleaning and defrosting the refrigeration spaces when the Chief Engineer commenced telling them how the work should be done. Appellant became angry and requested the Chief Engineer to leave or to take charge of the job. The Chief Engineer then invited Appellant to settle the matter by fighting on deck. Appellant refused to accept the invitation and sent for the Master. He went below and talked to the two seamen about the friction between them.

About 2100 on the same day, Appellant was again in the reefer box when the Chief Engineer entered and started to talk unpleasantly about the difficulty which had developed earlier in the day. Nobody else was present and Appellant was afraid of the Chief Engineer. Consequently, Appellant picked up a meat cleaver and went hurriedly to the Master's room. Appellant told the Master that there was going to be trouble. At this time, Appellant was very excited.

The Master started to change from his pajamas and slippers in order to go below. When Appellant ran from the room still holding the meat cleaver, the Master followed in a short time and headed for the engine room. On the way, he called to Appellant to stop and not to go into the engine room. Appellant was so far ahead of the Master that he either did not hear or did not understand what was said when the Master gave this order.

When Appellant arrived in the engine room and did not see the Chief Engineer, he went down the ladder one level. From here, he could see the Chief Engineer on the floor plates one level and about eight feet below Appellant. The total distance between them was fifteen to twenty feet. The Third Assistant Engineer was on watch and the fireman-watertender was in the fireroom. Appellant shouted some threatening language at the Chief Engineer while holding the meat cleaver in a position which is not established by the record. The Chief Engineer did not reply to Appellant's threats. The Chief Engineer was frightened because he thought Appellant might throw the meat cleaver at him. Since the Chief Engineer could not safely get out of the engine room, he stayed under the generator platform. The other two seamen heard Appellant shouting but could not understand what he was saying in the Greek language.

Appellant had not advanced any farther toward the Chief Engineer when the Master arrived after the shouting had stopped. Upon request, Appellant immediately handed the meat cleaver to the Master and left the engine room with him. The Master temporarily locked Appellant in the ship's hospital in order to give him time to cool off and become quiet. Later Appellant told the Master that he was sorry.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It contended that:

Point I. The finding that the assault specification was proved is not supported by the evidence. With the exception of the Chief Engineer, the Government witnesses testified (other than answers elicited by improper leading questions) that Appellant did not brandish the meat cleaver in the engine room and they did not know whether Appellant verbally threatened the Chief Engineer. Also, the latter could not reasonably have been in fear of imminent bodily harm because Appellant could not have thrown the meat cleaver and struck the Chief Engineer while he stayed safely under the generator platform on the level below Appellant. The Examiner did not find that the Chief Engineer was in actual danger from the meat cleaver at any time.

Point II. The evidence fails to support the specification alleging that Appellant created a disturbance. The presence of the Master was requested by Appellant on both occasions.

Point III. Appellant did not knowingly disobey the order of the Master because Appellant either did not hear the order given while he was running or he did not understand it. Appellant's obedience to the Master is indicated by his immediate surrender of the meat cleaver to the Master.

Point IV. The many prejudicial answers to leading questions should be struck from the record. Without this evidence, the record does not contain a prima facie case as to any specification.

Point V. The suspension for six months is inordinately severe. Appellant had an unblemished record for seventeen years. The Master characterized Appellant as a conscientious, sober, and very good man. Appellant was provoked by the threats and bullying of the Chief Engineer who was classified by the Third Assistant Engineer as "very ugly to get along with." Appellant should not be penalized by three specifications arising out of one incident.

Conclusion. The findings that the specifications were proved should be reversed and the charge dismissed. If any one of the specifications is found proved, it is respectfully submitted that the order should be reduced to an admonition in order to be commensurate with Appellant's conduct under the circumstances in this case.

APPEARANCE ON APPEAL: Miller and Seegar of New York City, by Burton M. Epstein, Esquire, of Counsel.

OPINION

The conducting of the hearing and the Examiner's decision were deficient in several respects. Numerous leading questions, directed by the Investigating Officer to his witnesses, should not have been permitted, even though not objected to, because Appellant was not represented by counsel at the hearing. Consequently, the answers to these questions were not considered in arriving at the above findings of fact.

The decision does not consider the fact that there is a considerable amount of conflicting

testimony in the record; there are no specific findings as to the credibility of the witnesses; and, in other respects, the decision does not comply with the requirement to "include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *." See Commandant's Appeal Decisions Nos. 1114, 1173, 1194 and citations of authority contained therein.

There is no finding in the Examiner's decision concerning the important element, as to the assault specification, whether the Chief Engineer was in fear of injury from the meat cleaver. There are no findings as to when the Master directed a lawful order to Appellant and whether Appellant heard the order. Findings covering these matters have been included with my findings of fact and are discussed infra.

With regard to specification alleging disobedience, it is pertinent that the testimony of the Chief Engineer, the Third Assistant and the fireman-watertender lead to the conclusion that it was more than a few "seconds" (as implied by the Examiner) between the arrival of Appellant in the engine room and when the Master reached there. The testimony of these three witnesses indicates that after Appellant arrived, he shouted at the Chief Engineer several times and went down one level in the engine room while the Chief Engineer realized that he should stay under cover. The Third Assistant and the fireman-watertender had time to observe these things before the Master entered the engine room. This time interval is the basis for my finding that Appellant was so far ahead of the Master on the way to the engine room that Appellant either did not hear or did not understand the Master's order not to go into the engine room. (The Master testified that this order was given while he was running to the engine room.) In addition to Appellant's testimony, this inference is indirectly supported by Appellant's immediate obedience when he did hear the Master tell Appellant to give the meat cleaver to him. For these reasons, the finding that Appellant [wrongfully] disobeyed a lawful order of the Master is reversed and the specification is dismissed.

Since there is no particular evidence that Appellant created a disturbance other than by any conduct which is covered by the assault specification, the specification referring to a disturbance is also dismissed. As Appellant points out on appeal, the Master's presence was requested by Appellant both in the afternoon and later in the evening. It was not a situation where the Master was called to stop a disturbance created by Appellant.

With respect to the specification alleging assault, it is my opinion that this was properly found proved to the extent that the Chief Engineer was in fear of bodily injury and that Appellant verbally threatened him. An assault is committed by putting another in apprehension of harm when there is the apparent present ability to inflict injury whether or not the actor actually intends to inflict or is capable of inflicting harm. Ladner v. United States (1958), 358 U.S. 169, 177; Guarro v. United States (C.A.D.C, 1956), 237 F.2d 578, 580. It is not essential that a person should be within actual striking distance at any time. 5 Corpus Juris, Assault and Battery, sec. 186. It is sufficient if Appellant had such an apparent ability to consummate the attack as to reasonably cause fear on the part of the Chief Engineer. See Commandant's Appeal Decision No. 1071. Also it is immaterial whether or not Appellant intended to injure the Chief Engineer with the meat cleaver.

Based on a consideration of the above essentials of an assault, there are several interwoven factors which convince me that Appellant was guilty as alleged rather than that he merely told the Chief Engineer that he was wanted by the Master. (The latter was Appellant's version.) These items are:

1. Appellant retained possession of the meat cleaver at all times after leaving the reefer box until he was disarmed by the Master. Although Appellant testified that he did not realize he had it, he must have been conscious of this in order to testify that he was holding it down at his side in the engine room.
2. Appellant ran below to the engine room without waiting for the Master despite Appellant's repeated testimony that he was afraid of the Chief Engineer and the absence of any evidence that the Master told Appellant to get the Chief.
3. Appellant did not stop at the top of the engine room but went down one level according to his own testimony.
4. Appellant testified that previously the Chief Engineer had acted the part of a threatening bully but that, in the engine room, he said nothing when Appellant called to him.
5. The Chief Engineer testified that Appellant threatened to kill him and since he could not get away he remained under the generator platform because he was afraid that Appellant might throw the meat cleaver at him.
6. Although the Master's testimony was sympathetic toward Appellant, the Master testified that Appellant was very excited and "blind". The Master locked Appellant up until he cooled off.

Appellant's retention of the weapon, his obvious anger at the Chief Engineer, his highly excited condition, his eagerness to get to the engine room and failure to stop upon entering it, all lead me to believe that Appellant's purpose was something more than to call the Chief Engineer to see the Master. Hence, I accept the Chief Engineer's testimony to the extent that he was threatened with bodily injury by Appellant.

It is also my conclusion that the Chief Engineer was in fear of being injured and that this fear was reasonable under the circumstances. Appellant's somewhat irrational condition, his approach toward the Chief Engineer, his threatening language and the Chief Engineer's inability to escape from the area of danger constitute a sufficient basis for the fear claimed by the Chief Engineer and for concluding that an assault was committed even though it might have been impossible for Appellant to have thrown the meat cleaver and hit the Chief Engineer while he remained under the generator platform. The conclusion that the Chief Engineer was actually frightened is supported by his quiet demeanor toward Appellant on this occasion rather than bullying him as previously. The position in

which Appellant held the meat cleaver is immaterial since there were reasonable grounds for apprehension by the Chief Engineer even if Appellant was holding it at his side.

For these reasons, the assault specification is found proved in part. It is proved as to the offer to inflict bodily harm but not proved as to the brandishing of the meat cleaver.

CONCLUSION

The order of six months' suspension will be reduced by one-half of this in view of the dismissal of two specifications and part of another, Appellant's prior unblemished record, Appellant's commendation by the Master and the provocation by the Chief Engineer. In arriving at this modification, the fact has been taken into consideration that the specification found proved in part is the most serious of the three specifications found proved by the Examiner.

ORDER

The order of the Examiner dated at Galveston, Texas, on 22 April 1960, is modified to provide for an outright suspension of three months.

As so MODIFIED, the order is AFFIRMED.

A. C. Richmond
Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 7th day of March 1961.